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In the
Supreme Court of the United States

Public Service Commission of Utah,
Stephen F. Mecham, Constance B. White, and Clark D. Jones,
Commissioners of the Public Service Commission of Utah
PETITIONERS

v.

US West Communications, Inc., MCI Telecommunications Corp.,
and AT&T Communications of the Mountain States, Inc.
RESPONDENTS

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

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114 pp

QUESTIONS PRESENTED

The Federal Communications Act of 1996 requires that telecommunications companies provide other telecommunications companies with access to their networks and the interconnection of their networks. If telecommunications companies are unable to mutually agree upon the terms and conditions of their interconnection, they are to submit their disputes to state utility regulatory commissions. A state commission is to resolve the submitted disputed issues. A state commission is also to approve or reject a proposed interconnection agreement; whether the agreement is obtained entirely by mutual agreement of the parties, by state commission imposed resolution, or combination of the two.

Questions presented:

1. Whether, after *College Savings Bank*, Congress, acting pursuant to its Article I Commerce Clause power, may require the Public Service Commission of Utah to waive sovereign immunity in order to exercise traditional police powers when establishing the terms and conditions under which telecommunications companies will provide services to the citizens of the State of Utah.

2. Whether the Public Service Commission of Utah made a knowing and voluntary waiver of sovereign immunity, within the structure of the Federal Telecommunications Act of 1996, where is must choose to abdicate the exercise of traditional police powers to retain immunity or submit to federal court jurisdiction in order to fulfill important governmental obligations.

3. Whether the federal courts may extend their jurisdiction, in contravention to *Seminole Tribe* and beyond Congress' remedial scheme, and assert jurisdiction over the individual members of the Public Service Commission of Utah under the *Ex Parte Young* doctrine when a party is dissatisfied with a past decision of the Public Service Commission.

LIST OF PARTIES

Parties participating in the proceedings before the Tenth Circuit Court of Appeals, Case No. 99-4203, and their designation in these proceedings are:

Petitioners: Public Service Commission of Utah and individual commissioners Stephen Mecham, Constance White and Clark Jones;

Respondents: US West Communications, MCI Telecommunications and AT&T Communications. The United States Department of Justice also participated in the proceedings before the Tenth Circuit Court of Appeals and would be considered a respondent in the proceedings before this court.

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The petitioners, Public Service Commission of Utah, Stephen Mecham, Constance White and Clark Jones, respectfully pray that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on June 20, 2000.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 216 F.3d 929, 2000 U.S. App. LEXIS 14348, and is reprinted in the appendix hereto, Appendix p. 2, *infra*.

The memorandum decision of the United States District Court for the Central District of Utah (Kimball, D.J.) is reported at 991 F. Supp. 1299, 1998 U.S. Dist. LEXIS 7775, and is reprinted in the appendix hereto, Appendix p. 45, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Tenth Circuit was entered June 20, 2000, affirming the District Court's ruling that denied the state defendants' motion to dismiss for lack of federal court jurisdiction over the state defendants. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Article III,

Section 2, Clause 1 reads as follows:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment to the Constitution of the United States reads as follows:

Suits Against States. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

47 U.S.C. §252(e)(6) reads as follows:

REVIEW OF STATE COMMISSION ACTIONS.-- In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State Commission makes a determination under this section, any

party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

STATEMENT OF THE CASE

The Public Service Commission is a state agency of the State of Utah, with the authority and responsibility to supervise and regulate all public utilities in the State of Utah[1]. Utah law permits multiple telecommunications companies to operate in the same geographic area and offer competing telecommunications services to the public.[2] Competing telecommunications companies are required by state law to interconnection their networks and permit other telecommunications companies to have access to their networks' facilities, functions and services.[3] The Public Service Commission is required to enforce these interconnection requirements and to resolve interconnection disputes between telecommunications companies.[4] The Public Service Commission is composed of three commissioners, each serving a six year term, appointed by the governor with the advise and consent of the state senate.[5]

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[1]Utah Code Ann. §54-4-1 (1994).

[2]Utah Code Ann. §54-8b-2.1 (1994).

[3]Utah Code Ann. §54-8b-2.2 (1994).

[4]*Id.*

[5]Utah Code Ann. §54-2-1.5 (1994).

An individual commissioner has no power or authority to transact or conduct any Public Service Commission business. A majority of the commissioners constitutes a quorum and a majority quorum is necessary to perform any duty or exercise any power of the commission.[6] Orders or decisions of the Public Service Commission are subject to direct judicial review by the Supreme Court of the State of Utah.[7]

US West Communications (hereafter US West), AT&T Communications of the Mountain States (hereafter AT&T) and MCI Telecommunications (hereafter MCI) are telecommunications companies certificated by the State of Utah to provide public telecommunications services in the State of Utah. Under state and federal law, they are required to interconnect their networks. US West is obligated to provide the other telecommunications companies with access to various portions of its equipment, facilities, and services.[8] Separately, both AT&T and MCI sought state regulatory commission resolution of various interconnection issues upon which they had failed to reach mutual agreement with US West. The Public Service Commission of Utah (hereafter Utah Commission) consolidated the state agency administrative actions, resolved the disputes and directed the parties to prepare interconnection agreements consistent with the ordered resolutions. The Utah Commission then reviewed and approved the submitted interconnection agreements.

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[6]Utah Code Ann. §54-1-3 (1994).

[7]Utah Code Ann. §78-2-2 (1996).

[8]47 U.S.C. §251 and Utah Code Ann. §54-8b-2.2 (1994).

Pursuant to 47 U.S.C. §252(e)(6), MCI sought federal court review of its interconnection agreement with US West and US West sought review of the two interconnection agreements (the agreement with MCI and the agreement with AT&T).[9] Both US West and MCI alleged that the Utah Commission approved interconnection agreements contained terms which were contrary to the provisions of the Federal Telecommunications Act of 1996, Public L. No 104-104, 110 Stat. 56 (1996) (hereafter the1996 Act). The Utah Commission, the individual commissioners of the Utah Commission and MCI were able to stipulate to terms by which the state defendants agreed to appear in federal district court and participate in MCI's initiated action. The state defendants and US West were unable to reach a similar stipulation relating to US West's federal court action. The Utah Commission and individual commissioners moved for their dismissal from the US West initiated action. The Federal District Court for Utah, Judge Dale A. Kimball presiding, denied the state defendants' Motion to Dismiss. *US West Commun. v. Public Service Comm'n of Utah*, 991 F. Supp.1299 (D. Utah 1999).The District Court ruled that it had jurisdiction over the state defendants by concluding that the State of Utah had waived sovereign immunity under the District Court's application of this Court's ruling in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S. Ct. 2219, 1999 U.S. LEXIS 4375 (1999). The District Court characterized

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[9]In addition to the 1996 Act, both MCI and US West alleged federal district court jurisdiction pursuant to 28 U.S.C. §§1331 and 1337. US West alleged further jurisdiction under 28 U.S.C. §§2201-02 (the Declaratory Judgement Act).

the1996 Act as Congress' gratuity offered to the states; to resolve interconnection disputes and approve interconnection agreements on condition of waiver of sovereign immunity. The District Court further concluded that it could exercise jurisdiction over the individual commissioners of the Utah Commission under the exception to sovereign immunity articulated in *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).

The state defendants brought appeal to the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit Court affirmed the District Court's ruling. *MCI Telecommun. Corp. v. Public Service Comm'n of Utah*, 216 F. 3d. 929, 2000 U.S. App. LEXIS 14348 (10th Cir. 2000). The Tenth Circuit Court, using the gratuitous gift discussion found in *College Savings Bank*, concluded that "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity. As in Petty and Dole, Congress was under no obligation to allow states to participate in the Act's regulatory scheme. Accordingly, by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *MCI Telecommun., supra*, 216 F. 3d at 938. The Tenth Circuit Court rejected the state defendants' argument that if the gift/gratuity discussion has application, the 1996 Act results in an impermissible sanction, not a gratuity. Although both the majority and the dissent in *College Savings Bank* note that a state does not voluntarily waive immunity where Congress' offered inducement is substantial, the Tenth Circuit Court stated that "the size of the 'gift' was not an issue in College Savings Bank because 'the point of coercion [was] automatically passed' when Congress

conditioned participation in an otherwise lawful activity on a state's consent to suit. Id. Thus, the Court's discussion of the coercion theory was merely dicta." *Id.*, 216 F. 3d at 938, n. 6. The Tenth Circuit Court further ruled that the case presented a "straightforward Ex Parte Young case" and federal court jurisdiction could be exercised over the individual commissioners of the Utah Commission. *Id.*, 216 F. 3d at 939.

REASONS FOR GRANTING THE WRIT

I. Contrary to this Court's decision in *College Savings Bank*, the Tenth Circuit Court's ruling permits Congress' Commerce Clause power to require the States to waive sovereign immunity in order to exercise police power.

In *College Savings Bank*, this Court stated its intent to"drop the other shoe" and overrule any remaining application of "the constructive-waiver experiment" of *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). *College Savings Bank, supra,* 527 U.S. at 680. Some federal courts have recognized that the shoe has dropped. *Chavez v. Arte Publico Press*, 157 F. 3d 282, 289 (5th Cir. 1998) ("[W]e must 'drop the other shoe,' and declare that Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court."), and *GTE North, Inc. v. Strand*, 209 F. 3d 909, 922 n. 6 (6th Cir. 2000)("[I]t is virtually certain that a state utility commission's decision to accept regulatory authority under the FTA [the 1996 Act] cannot legitimately be construed as a valid waiver of sovereign immunity. The Supreme Court's recent decisions . . . undermine earlier

circuit court decisions holding that the Eleventh Amendment does not bar suits against state utility commission because such commissions constructively waive their immunity from suit by participating in the regulatory scheme established by the FTA." (Internal citations omitted)). *See, also, Wisconsin Bell v. Public Service Comm'n of Wisconsin*, 57 F. Supp.2d 710 (W.D. Wis. 1999), *Bell Atlantic-Maryland v. MFS Intelenet of Maryland*, ____ F. Supp. ___ , 1999 U.S. Dist. LEXIS 16477 (D. Md. 1999), *AT&T Commun. v. BellSouth Telecommun.*, 43 F. Supp. 2d 593 (M.D. La. 1999). Other federal courts have not. These cobbler federal courts continue to apply the constructive waiver shoe, but now dressed as a gratuitous Congressional offer. *E.g.*, the Tenth Circuit Court ruling herein and *MCI Telecommun. Corp. v. Illinois Bell Tel. Co.*, __ F. 3d __, 2000 U.S. App. LEXIS 17739 (7th Cir. 2000). The Tenth Circuit Court's continued application of a constructive waiver theory is not consistent with *College Savings Bank*'s rationale; either the majority's or the dissent's. Without guidance from this Court, this split between the federal courts will continue to deepen.[10] Without further

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[10]The application of *College Savings Bank* in connection with the 1996 Act and state regulatory commissions is raised in numerous, pending circuit court proceedings. *BellSouth Telecommun. v. North Carolina Util. Comm'n*, Nos. 99-1845 *et.al.* (4th Cir. filed June 21, 1999) and *Bell Atlantic-Maryland v. MCI Worldcom,* Nos. 99-2459 *et al.* (4th Cir. filed October 29, 1999), argued seriatim May 1, 2000; *AT&T Commun. v. BellSouth Telecommun.*, No. 99-30421 (5th Cir. filed April 12,1999); *Southwestern Bell Tele. Co. v. Connect Commun.*, No. 99-3953 (8th Cir. filed October 21, 1999); *MCI Telecommun. v. BellSouth Telecommun.*, No. 00-13505FF (11th Cir. filed July 7, 1999). The split is real, as

direction from this Court, some federal courts will continue to craft the loss of state sovereign immunity through *Parden* style constructive waivers (albeit with the new lexicon of "Congressional gratuity"), while other federal courts will continue to recognize the states' constitutionally protected immunity right.

Application of a renamed constructive waiver fiction is contrary to *College Savings Bank*'s ruling:

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states and their state regulatory commissions and officers are viewed as proper defendants in some circuits, while in other circuits they are recognized to be beyond a federal court's jurisdiction on account of their sovereign immunity. The issue has and continues to be raised in federal court proceedings throughout the country, seeking review of arbitrations and interconnection agreement reviews, with divergent results. The issue will also arise in any instance where a state regulatory commission takes any action alleged to be inconsistent with the 1996 Act. Federal courts have stated that 47 U.S.C. §252(e)(6) federal court review is available not only to review the approval or rejection determinations of state regulatory commission, but also in any subsequent state agency action which has some relationship to an interconnection agreement. *See e.g., Iowa Util. Brd. v. F.C.C.,* 120 F.3d 753, 804 n 24 (8th Cir. 1997) (noting federal court review, pursuant to §252, of state commissions' enforcement decisions of previously approved interconnection agreements); and *Illinois Bell Tel. Co. v. WorldCom Techs. Inc.,* 179 F.3d 566 (7th Cir. 1999) (§252 federal court review of a state commission resolution of a contract interpretation dispute between two telecommunications companies).

> Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of Seminole Tribe. . . . "All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to regulate conduct. Thus all federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and – to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability – can be redescribed as invitations to 'waiver.'" *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 43, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)(Scalia, J. dissenting).

College Savings Bank, supra, 527 U.S., at 683. The 'dropping the other shoe' phrasing itself originates with Union Gas, overruled by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). In his *Union Gas* dissent, Justice Scalia wrote,

> *Parden* is the only case in which we have held that the Federal Government can demand, as a condition of its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity. Two terms ago, in Welch, ... We explicitly declined to address, however, the continuing validity of Parden's holding that

> explicitly declined to address, however, the continuing validity of Parden's holding that the Commerce Clause provided the constitutional power to make such a demand. I would drop the other shoe. There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state immunity exists. . . . At bottom, then, to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field the Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers – that is, to adopt the very principle I have just rejected.

Union Gas, *supra*, 491 U.S. at 42-44 (Scalia, J. dissenting)(internal citations omitted). The Tenth Circuit Court's opinion ignores the "obvious and fatal difficulties in acknowledging such a power." According to the Tenth Circuit Court, Congress, in enacting the 1996 Act pursuant to its Article I Commerce Clause power, may, indeed, demand that states waive their constitutionally protected sovereign immunity; this Court's rulings and analyses in *College Savings Bank, Union Gas* and *Seminole Tribe*, not withstanding. *College Savings Bank* is a significant opinion in our jurisprudence concerning the states' constitutionally protected sovereign immunity. The lower federal courts, however, apply *College Savings Bank* with increasingly divergent results. Clarification from this Court is needed. Direction is needed particularly where the state action, said to evidence the state's waiver of immunity, is not state operation

state's traditional police powers. State conduct in furtherance of its public interest and public policy should not be the consideration extorted from the state to support an implication of immunity waiver.

II. Preventing a state from enforcing its own laws, regulating its public right-of-ways, protecting consumers and other market participants, and protecting the public safety and welfare unless it waives immunity and submits to private party suits in federal court is not a knowing and voluntary waiver of sovereign immunity.

The Tenth Circuit Court concluded that the State of Utah made a knowing and voluntary waiver of sovereign immunity. Waiver exhibited through the Utah Commission's action in resolving the telecommunications companies' disputes and in reviewing the tendered interconnection agreements. This Court has recognized that state regulation of utilities "is one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. v. New Orleans*, 491 U.S. 350, 365 (1989). The Tenth Circuit Court's opinion strays due to its conclusion that the exercise of state police power is not an otherwise lawful activity of a state, but a federal gratuity. The Tenth Circuit Court's reliance upon *AT&T Corp. v. Iowa Utilities Broad*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) for this conclusion is not sound. *Iowa Utilities Board* did not address the source of state regulatory power, but the source of Federal Communications Commission (hereafter FCC) regulatory power to promulgate the regulations challenged in that case. *Iowa Utilities Board*'s ruling is based on a recognition of the jurisdictional authority of both the FCC and the states; that the1996 Act expanded

ruling is based on a recognition of the jurisdictional authority of both the FCC and the states; that the1996 Act expanded the FCC's authority into an area previously exclusive to the states.[11] "After the 1996 Act, . . . Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control." *Id.*, 525 U.S. at 381 n. 8. The source of the states' police power does not derive from a congressional gratuity. In the underlying administrative proceedings before the Utah Commission, AT&T and MCI recognized the existence and application of the state's police power. They requested that the Utah Commission go beyond the provisions of the 1996 Act and resolve some of their disputed interconnection issues on the basis of state law and state policies. Even if the Utah Commission's ability to resolve an interconnection dispute between two telecommunications companies is based solely on the 1996 Act, the Utah Commission is required to do much more than intercede between the two bickering companies.

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[11]Prior to the 1996 Act, Utah law had already required telecommunications companies to interconnect their networks and provide reciprocal access to their networks' facilities and services. Utah Code Ann. §54-8b-2.2 (1999 Supplement). Utah law charged the Utah Commission with enforcing these obligations and resolving interconnection disputes between telecommunications companies. *Id.* Hence, the Utah Commission's authority for its action is not dependent upon any Congressional gratuity said to be offered in the 1996 Act. Congress made explicit its intent that the 1996 Act was not to be construed as preempting preexisting state laws and authority. See, Sections 101 (codified at 47 U.S.C. §252(e)(3)) and 601 of the 1996 Act.

reflects Congress' anticipation, actual expectation, that the states will apply their traditional police power in other areas. The states are expected to ensure that there is no discrimination against other telecommunications market participants. 47 U.S.C. §252(e)(2)(A)(i). States are expected to establish and enforce the requirements of state law. 47 U.S.C. §252(e)(3). States are expected to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. 47 U.S.C.§253(b). States are to manage the public right-of-ways and require fair compensation for the use of such public property. 47 U.S.C. §253(c). The very process by which the 1996 Act dictates that the states are to exercise their police power in furtherance of these important state areas of concern, however, is the conduct which the Tenth Circuit Court's approach treats as evidencing the state's knowing and voluntary waiver of immunity. If the state wishes to retain immunity and does not avail itself of Congress' dictated process, the state faces the prospect that offending terms or conduct are assumed to have state approval, with no possibility of state court intervention. 47 U.S.C. §252(e)(4).

In *College Savings Bank, supra*, this Court held that Congress may not condition the waiver of state immunity upon the loss of a substantial state interest. *Id.*, 527 U.S. at 687. The Tenth Circuit Court's ruling equates a state's exercise of traditional police power in regulating utilities with a state's knowing and voluntary waiver of immunity. This is an important question of federal law which has not been and should be decided by this Court.

The Tenth Circuit Court's decision is based upon its characterization of the state's conduct as permitted by a

The Tenth Circuit Court's decision is based upon its characterization of the state's conduct as permitted by a gratuity from Congress. Without further clarification of this Court's intent or meaning in the *College Savings Bank* discussion of Congressional gifts and sanctions, the Tenth Circuit Court's ruling will countenance the conclusion that Congress can prevent the states from exercising traditional police power (in preventing discrimination, safeguarding consumers, protecting the public safety and welfare or regulating the use of public property) unless the states waive their immunity. This is not consistent with the views expressed by either the majority or the dissent in *College Savings Bank*.[12] Without further direction from this Court, our jurisprudence will accept the anomaly that state sovereign immunity precludes private party suits, against a state and its agencies in federal courts, when a state acts like an ordinary market participant, but sovereign immunity is not applicable where a state acts as a sovereign. Immunity would apply where a state acts to market and sell securities or investments, *College Savings Bank*, *supra*; where a state acts to operate a commercial tug boat service, *Ex parte New York*, 256 U.S. 490, 65 L. Ed.1057, 41 S. Ct. 588 (1921); where a state operates a commercial publishing/printing enterprise, *Chavez v. Arte Publico Press*, *supra*. But, where a state acts in areas in which only sovereigns act, to protect and further

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[12]While the dissent may accept Congress' Commerce Clause power to condition state commercial activities on the condition of waiver, it would not do so for a state's activities in "the area of its 'core' responsibilities, and in a way unlikely to prove essential to the fulfillment of a basic governmental obligation." *College Savings Bank, supra,* 527 U.S. at 694 (Breyer, J., dissenting).

Telecommun. Corp. v. Public Service Comm'n of Utah, *supra*, and *MCI Telecommun. Corp. v. Illinois Bell Tel. Co.*, *upra*.

III. The Tenth Circuit Court's ruling permits federal courts to apply the Ex parte Young doctrine contrary to Congress' intended remedial scheme and contrary to the states' sovereign immunity.[13]

When Congress enacted the 1996 Act, it created rights and imposed duties for telecommunications companies which the federal government had previously not expected of the telecommunications industry. *See*, 47 U.S.C. §251 and *Iowa Utilities Board*, *supra*. Rather than passing legislation which simply created these benefits and obligations, Congress also specified a detailed remedial scheme. An enforcement scheme whereby a telecommunications

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[13]The issues raised in this portion of Utah's Petition for Writ of Certiorari are identical or similar to the issues, relating to the application of the *Ex Parte Young* doctrine, raised in the Petitions for Writ of Certiorari filed by the State of Michigan in this Court's Proceedings Nos. 99-1878, *John G. Strand, et.al. v. Michigan Bell Telephone, et al.* and 00-101, *John G. Strand et al. v. GTE North Incorporated, et al.* The Utah Commission participates in the 99-1878 proceeding through the *Amici Curiae* Brief of the State Commissions of Pennsylvania, Arkansas, California, Florida, Hawaii, Kentucky, Maine, Maryland, Montana, Nevada, New Hampshire, New York, North Carolina, Tennessee, Utah, Virginia, and Wisconsin, and the States of Delaware, Indiana and Ohio Supporting Petitioners.

Congress also specified a detailed remedial scheme. An enforcement scheme whereby a telecommunications company would obtain the benefits of the rights so created and, concomitantly, other telecommunications companies would fulfill their new obligations. Similar to the remedial scheme Congress relied upon in the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701 et seq.), Congress' remedial scheme for the 1996 Act does not primarily rely upon the courts for enforcement of the rights and obligations created. Like the Indian Gaming Regulatory Act, the 1996 Act's scheme imposes obligations upon competing parties and contains specific time lines for the parties (telecommunications companies) to make contractual agreements, negotiating in good faith; reliance not upon courts to resolve negotiating impasses, but upon other third party entities (state commissions) to attempt to mediate or to arbitrate disputes, again within specified time lines; and a limited role for the courts to review specified aspects of the precedent enforcement scheme created by Congress. 47 U.S.C. §252.

In the circumstances as those which underlie in this case (where a state commission has acted), Congress specified a very limited role for the federal district courts, vis, "to determine whether the agreement or statement meets the requirements of section 251 and this section [252]." 47 U.S.C. §252(e)(6). In *Seminole Tribe*, *supra*, this Court held that suit against State of Florida officials could not be maintained under the *Ex parte Young* doctrine because the Indian Gaming Regulatory Act contained Congress' remedial scheme, which was not to be supplanted by the courts. *Id.*, 517 U.S. at 75, 76. The Tenth Circuit Court's ruling creates a substitute role for the federal district courts in regards to the 1996 Act. The Tenth Circuit Court's ruling greatly expands

agreement for compliance with the two identified code sections, the full remedial powers of a federal court under *Ex parte Young* may now be wielded against an individual member of a state regulatory commission.[14]

Seminole Tribe does not prevent Congress from including *Ex parte Young* type of relief in its limited remedial scheme. *Id.*, 517 U.S. at 75, n. 17. But courts should ensure that that is Congress' intent. They are to consider whether Congress' statutory enactment evidences such intent. *Id.* Using the analytical approach used by this Court in *Seminole Tribe*, one must conclude that *Ex parte Young* has no application in the 1996 Act. Throughout the 1996 Act, Congress' reference is to states or state commissions; not once did Congress refer to or identify an individual officer of a state regulatory commission. The 1996 Act evidences Congress approaching the states as states, not seeking to

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[14]The expansive nature of the Tenth Circuit Court's ruling is not limited to state regulatory commission officers. Since the interconnection agreements are contracts between the telecommunications companies, what is to occur where one party seeks enforcement of the contract in a state court, as a normal contract dispute? Are state court judges to be subject to a federal court *Ex Parte Young* based suit if one of the parties is disappointed with the judge's resolution of the dispute? Since the states are also required to pursue the protection of their property interests in public right of ways under the 1996 Act's provisions, are the personnel of state agencies responsible for the management or policing of public right of ways also within the reach of the Tenth Circuit Court's approach? These state officers are far beyond Congress' reference to state utility commissions in the 1996 Act.

a state regulatory commission. The 1996 Act evidences Congress approaching the states as states, not seeking to reach individual state officers through an *Ex parte Young* approach. Without further direction from this Court, federal courts are misled by the Tenth Circuit Court's conclusion and apply the *Ex parte Young* doctrine beyond circumstances intended by Congress.

At the heart of US West's complaint is dissatisfaction with a past ruling of the Utah Public Service Commission. The Tenth Circuit Court's holding permits anticipatory pleading to transform what is otherwise a request to review a past administrative agency decision into an *Ex parte Young* proceeding in federal court. The federal courts have been euchred into applying *Ex parte Young* in the very circumstances cautioned against in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). "To interpret Young to permit a federal court action to proceed in every case where prospective declaratory and injunctive relief is sought against an officer, named in his individual capacity, would adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction. The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading." Ultimate protection of constitutionally protected rights is the unique province of this Court. Where lower courts have improperly impinged upon the sovereign immunity of the states, this court should intervene to prevent future violations of this important right.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted, October, 2000

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